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MASIMO CORPORATION

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

MICHAEL RUHE and VICENTE
CATALA,

Plaintiffs,

v.

MASIMO CORPORATION, and DOES 1
to 100, inclusive,

Defendants.

Civil Action No.
SACV 11-00734 CJC (MLGx)

**MEMORANDUM OF POINTS
AND AUTHORITIES IN
SUPPORT OF MASIMO
CORPORATION'S *EX*
PARTE APPLICATION TO
CONTINUE HEARING ON
MOTION TO CONFIRM
ARBITRATION AWARD**

Honorable Cormac J. Carney

1 Pursuant to Local Rule 7-19, Defendant Masimo Corporation hereby
2 submits this *Ex Parte* Application for the Court to issue an Order that continues
3 Plaintiffs' Motion to Confirm Arbitration Award (Dkt. Nos. 29-31) so that it
4 may be heard on March 31, 2014, along with Masimo's soon-to-be-filed motion
5 to vacate that same Arbitration Award.

6 Pursuant to L.R. 7-19.1, Masimo sought to resolve the need for this
7 application and informed Plaintiffs of its intent to file it. Palin Decl. ¶ 3. At
8 that same meet and confer, Masimo also discussed with Plaintiffs its motion to
9 vacate the Arbitration Award. *Id.*

10 This Application is based upon the argument contained herein, the
11 Declarations of Joseph R. Re and Mark T. Palin, and the exhibits attached
12 thereto. A Proposed *Ex Parte* Order is also lodged herewith.

13 **A. Procedural Background**

14 On September 16, 2011, this Court stayed this case pending arbitration.
15 Dkt. No. 28. On January 15, 2014, the Arbitrator rendered his Final Arbitration
16 Award. The Parties received the Final Award the following day, and late that
17 evening, Plaintiffs emailed Masimo requesting to meet and confer on Plaintiffs'
18 Motion to Confirm the Arbitration Award. Palin Decl. ¶ 2, Ex. 1. Masimo
19 responded, explaining that, pursuant to JAMS Rule 24, the award would not be
20 final until January 30, 2014 (14 days after service). *Id.* Mr. Palin, Masimo's
21 counsel, explained that Masimo was currently studying the award and hoped to
22 be prepared to meet and confer with Plaintiffs the following week. *Id.* The
23 parties never spoke again before Plaintiffs filed their Motion to Confirm on
24 January 31, 2014, one day after the award became final. *Id.* Masimo intends to
25 move to vacate the Arbitrator's award and has already met and conferred with
26 Plaintiffs on that Motion. *Id.* ¶ 3.

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1 **B. Motions to Confirm and Vacate Should Be Heard Together**

2 Under the Federal Arbitration Act, 9 U.S.C. § 9, the Court cannot grant an
3 order confirming an arbitration award if “the award is vacated, modified, or
4 corrected as prescribed in sections 10 and 11 of this title.” Pursuant to 9 U.S.C.
5 § 12, Masimo has three months from the time the Arbitrator delivered his award
6 on January 16, 2014, to serve a notice of a motion to vacate the award.
7 However, Masimo does not intend to wait three months to do so. Rather,
8 Masimo is currently reviewing the award and preparing its motion to vacate. Re
9 Decl. ¶ 4.

10 Plaintiffs’ race to have the Court confirm the award before this Court can
11 consider and rule on Masimo’s motion to vacate does not serve the interests of
12 justice or promote judicial economy. Moreover, both the Federal Arbitration
13 Act and the California Code of Civil Procedure, upon which Plaintiffs based
14 their Motion to Confirm (*see* Dkt. No. 29), authorize Masimo to file a motion to
15 vacate. *See* 9 U.S.C. §§ 10, 12; C.C.P. § 1285. Thus, Masimo seeks an order
16 continuing Plaintiffs’ Motion to Confirm so it could be heard along with
17 Masimo’s motion to vacate.

18 Plaintiffs maintain that Masimo should simply oppose Plaintiffs’ Motion
19 to Confirm, rather than file a separate motion to vacate. *Palin Decl. Ex. 2.*
20 However, Masimo is entitled to file its motion to vacate separate and apart from
21 any motion to confirm. *See* 9 U.S.C. §§ 10, 12; C.C.P. § 1285. Moreover,
22 Masimo would be unfairly prejudiced by not being able to file a reply brief in
23 support of its motion to vacate the arbitration award.

24 Furthermore, the Federal Arbitration Act contemplates that this Court can
25 stay enforcement proceedings where the adverse party moves to vacate. *See* 9
26 U.S.C. § 12; *see, e.g., Marsillo v. Geniton*, No. 03-CV-2117 (TPG), 2004 WL
27 1207925 at *4 (S.D.N.Y. June 1, 2004) (“A stay of proceedings to confirm an
28 arbitration award is contemplated only in order to permit consideration of

1 motions to vacate, modify or correct an award. 9 U.S.C. § 12.”). Thus, it makes
 2 perfect sense that courts consider motions to vacate even after the filing of
 3 motions to confirm. *See, e.g., Kim-C1, LLC v. Valent Biosciences Corp.*, 756 F.
 4 Supp. 2d 1258, 1261 (E.D. Cal. 2010) (considering motion to vacate filed after a
 5 motion to confirm); *Weiner v. Original Talk Radio Network Inc.*, 10-CV-05785
 6 (YGR), 2013 WL 1856568, at *5 (N.D. Cal. May 2, 2013) (same); *In re*
 7 *Arbitration Between Regan Holding Corp. & Legacy Mktg. Grp., Inc.*, 02-CV-
 8 01738 (WHA), 2002 WL 1733729, at *2 (N.D. Cal. July 12, 2002) (same).
 9 Accordingly, the appropriate procedure is to have the motions heard together as
 10 Masimo requests.

11 **C. Masimo Requests a March 31, 2014 Hearing Date**

12 Masimo requests that the hearing date on both Motions be set for March
 13 31, 2014. Masimo’s good cause for selecting such a date is to allow time to
 14 complete briefing on its motion to vacate and to accommodate the schedule of
 15 its lead trial counsel, Joseph R. Re. Mr. Re has an arbitration trial in San
 16 Francisco for Masimo beginning on March 3, 2014, the day Plaintiffs noticed
 17 their Motion to Confirm. Re Decl. ¶ 2. In addition, on March 11, Mr. Re is to
 18 be lead counsel in a patent trial before Judge Selna of this Court that may
 19 continue to the following week. *Id.* ¶ 3. Thus, to allow Mr. Re’s participation
 20 on the reply briefing on Masimo’s motion to vacate and to conduct the oral
 21 argument on both parties’ Motions, Masimo requests that they both be heard on
 22 March 31, 2014. *Id.* ¶ 4.

23 **D. Masimo Had To Seek Relief By Ex Parte Application**

24 Masimo seeks this relief by way of an *ex parte* application because
 25 Masimo would be irreparably prejudiced if its request were submitted according
 26 to a regularly noticed motion. *See Mission Power Eng’g Co. v. Continental*
 27 *Casualty Co.*, 883 F. Supp. 488, 492 (C.D. Cal. 1995). Plaintiffs’ Motion is
 28 currently scheduled to be heard before this Court could hear a regularly noticed

1 motion for continuance. Masimo would also suffer additional irreparable
2 prejudice if the Court were to confirm the arbitration award before considering
3 Masimo's motion to vacate.

4 Masimo did not cause the need for *ex parte* relief. *Mission Power*, 883 F.
5 Supp. at 492. The Arbitrator's award became final on January 30, 2014.
6 Masimo has not had a reasonable amount of time to review the award and
7 prepare its briefing on its motion to vacate. Masimo in good faith informed
8 Plaintiffs when it hoped to be able to meet and confer on Plaintiffs' Motion.
9 Palin Decl. ¶ 2. However, Plaintiffs never again contacted Masimo's counsel to
10 conduct such a meet and confer before filing their Motion. *Id.* Thus, Masimo
11 was unable to propose any consolidated briefing schedule to the Court before
12 Plaintiffs filed their motion. Plaintiffs filed their Motion only one day after the
13 arbitration award became final, forcing Masimo to seek the current *ex parte*
14 relief for a reasonable schedule to bring its motion to vacate.

15 Moreover, Masimo is without fault in causing the need for *ex parte* relief.
16 It met and conferred with Plaintiffs in an effort to avoid the need for this
17 Application. *Id.* ¶ 3. During that meet and confer, Masimo sought Plaintiffs'
18 agreement on a briefing and hearing schedule for both of the parties' motions.
19 *Id.* Plaintiffs' counsel refused to discuss any proposals, stating that Plaintiffs
20 did not need any extra time beyond the normal seven days provided under the
21 Local Rules to oppose Masimo's motion to vacate and that Masimo should
22 simply file its *ex parte* application. *Id.*

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1 Therefore, Masimo respectfully requests that Plaintiffs' Motion to
2 Confirm the Arbitration Award be heard on March 31, 2014, along with
3 Masimo's motion to vacate that same award.

4 Respectfully submitted,

5 KNOBBE, MARTENS, OLSON & BEAR, LLP
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8 Dated: February 3, 2014

By: /s/ Joseph R. Re

9 Joseph R. Re
10 Stephen C. Jensen
11 Joseph S. Cianfrani
12 Payson J. LeMeilleur

13 Attorneys for Defendant,
14 MASIMO CORPORATION
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